The Court of Appeals, by Decision and Judgment dated May 16, 2005, affirmed the Order of the District Court. Even though Section 1114 applies by its express terms only to "retired employees", the Court held that the statute covered the Respondents who, according to the Court itself, were "on the verge of retirement" but had not retired. (3a). This holding constitutes a revision by the Court of Section 1114.

The Court reached this result because it incorrectly deemed the Debtors' actions in terminating the Respondents to be unfair and to undermine the purpose of Section 1114. (12a-13a n.10, 15a, 16a). In order to avoid this "unfair" result, the Third Circuit agreed with the District Court that the termination of the Respondents without cause constituted a "forced retirement" (15a) despite the fact that "retirement" is an unambiguous term which means the voluntary withdrawal from employment usually by reason of age.

The Court recognized that equating "forced retirement" with termination without cause would mean that a 25 year old employee who was so terminated would be "retired" for purposes of Section 1114. (*See* 14a-15a). In order to avoid this situation, the Court deliberately created an ambiguity in Section 1114 by holding that the issue of whether an employee had been "forcibly retired" had to be determined on a case-by-case basis. (15a). Thus, the Court not only rendered ambiguous an unambiguous statute, but in so doing, expressly invited further substantial litigation to resolve the ambiguity on a case-by-case basis. Since, in the present case, the Respondents were "on the verge of retirement" when they were discharged, the Court held that they had been forcibly retired and were therefore covered by Section 1114. (15a-16a).

The Court also held that, pursuant to the Agreements, voluntary retirement was a condition precedent to obtaining benefits. However, GDC, by discharging the Respondents, prevented them from retiring and fulfilling that condition. As a matter of contract law, the condition of voluntary retirement was therefore excused and the Court thus found that the Agreements entitled the Respondents to benefits even though they had not retired. (14a). As described above, however, GDC did not prevent the Respondents' voluntary retirement but, to the contrary, gave the Respondents eleven days notice of their discharge. By giving such notice, GDC thereby afforded the Respondents the full opportunity to retire voluntarily before they were discharged. Moreover, even if GDC, by discharging the Respondents without cause, *had* prevented them from retiring, Section 1114 still applies only to "retired employees", and thus not to the Respondents. Had GDC prevented retirement, this would only mean that the Petitioner had breached the Agreements, an issue which is irrelevant to the application of Section 1114 in the present case. It was therefore error for the Court to apply the prevention doctrine to GDC's conduct.

In a concurring opinion, Judge Pollak held that the Respondents had not retired and were therefore not "retired employees" so as to be covered by Section 1114. (21a-25a). However, Judge Pollak held that the Agreements were not executory and therefore were not subject to rejection by the Debtors pursuant to Section 365(a) of the Bankruptcy Code. (26a-34a).

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS IMPROPERLY AMENDED THE UNAMBIGUOUS PROVISIONS OF SECTION 1114 OF THE BANKRUPTCY CODE

Section 1114, by its express terms, applies only to "retired employees". The term "retirement" is not ambiguous and is defined as "a voluntary termination of one's own employment, especially upon reaching a certain age." BLACK'S LAW DICTIONARY 611 (2d pocket ed. 1996).

It is undisputed that the Respondents were not retired, but had been terminated by GDC without cause. (3a, 7a, 15a, 24a). Indeed, the Court of Appeals nowhere asserted that the Respondents had ever retired (*See* 24a). Nevertheless the Court held that the Respondents were protected by Section 1114. In order to reach this result the Court rewrote Section 1114 by holding that GDC's termination of the Respondents without cause constituted a "forced retirement" of employees "on the verge of retirement", terms and concepts which are found nowhere in the statute. (14a-16a). The Court's holding thus created the absurd result that the Respondents, who had not retired when they ceased being employed by GDC, had indeed "retired" for purposes of Section 1114.

Moreover, although Section 1114 as enacted by Congress is clear and unambiguous regarding the definition of the class of protected persons, the statute as amended by the Third Circuit is not. The Court below itself recognized that it had created an ambiguity when it held that "[t]he contours of such a concept of 'forced retirement' may receive appropriate interpretation, when it occurs, by a case-by-case development". (15a). Thus, the Court not only rendered

Section 1114 ambiguous, but expressly invited serial piecemeal litigation in order to determine which non-retired employees were "forcibly retired" and were therefore covered by Section 1114. Such litigation would be totally unnecessary under Section 1114 as written and enacted by Congress.

It was error for the Court of Appeals to rewrite the unambiguous language of Section 1114. Thus, in *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004), this Court set forth the applicable rule as follows:

> The starting point in discerning congressional intent is the existing statutory text, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters* [* * *1034] *Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). So we begin with the present statute.

Accord, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("In answering this question, we begin with the understanding that Congress 'says in a statute what it means and means in a statute what

it says there. . . .'") (citation omitted); *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted); *United States v. Ron Pair Enterpr., Inc.*, 489 U.S. 235, 241 (1989):

> "The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. . . . In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."

(citations omitted).

The Court rewrote Section 1114 because it didn't like the fact that the Debtors had discharged the Respondents without cause one day after moving to reject the Agreements pursuant to Section 365(a). (12a-13a n.10, 15a-16a). Thus, the Third Circuit held that (a) this action was unfair and that the Debtors were trying to undermine the purpose of Section 1114, (*Id.*) and (b) the Debtors prevented the Respondents from retiring voluntarily as required as a condition precedent by the Agreements in order to obtain benefits thereunder. (13a-14a). Both of these holdings are without merit.

As a matter of undisputed fact, as held by the Court of Appeals itself, GDC gave the Respondents eleven days notice of their discharge and of the termination of the Agreements. (7a). During that time period the Respondents who, according

to the Court of Appeals were "on the verge of retirement" (15a), could have retired voluntarily within the meaning of Section 1114. The Respondents *chose* not to take advantage of this opportunity.

Thus, far from being unfair and trying to undermine the purpose of Section 1114, GDC gave the Respondents the opportunity to comply with the statute by retiring. Accordingly, GDC did not act unfairly, or attempt to undermine Section 1114, or prevent the Respondents from retiring voluntarily as a contractual condition to obtaining benefits under the Agreements.

The Third Circuit's incorrect assertion that GDC's conduct was unfair is the key to the Court's holding. The Court simply did not like what GDC did or that the Respondents would lose their benefits as a result of the application of Section 1114(a) as written. In order to avoid what it deemed an "unfair" result, the Court thus proceeded to amend the statute so that the phrase "retired employees" includes people who have not retired but who instead have been discharged without cause or are "on the verge of retirement." (15a-16a). However, the Court was not entitled to revise Section 1114 because it didn't like the result of GDC's compliance with that statute. *E.g.*, *Dodd v. United States*, __ U.S. __, 125 S. Ct. 2478, 2005 U.S. LEXIS 4847, at *12 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1983) ("The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment of § 6501. Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

By judicially amending Section 1114, the Court of Appeals created uncertainty in the law by putting up for grabs the major and basic issue of who is covered by that statute. Instead of the clear definition of "retired employee" enacted by Congress, the Court below expressly invited endless litigation on this issue. Such a prospect must inevitably discourage employers from providing health benefits to retirees, a result most certainly not intended by Congress. The Court's holding is thus contrary to public policy as well as settled law as expressed in numerous decisions of this Court. Moreover, the applicability of Section 1114 is an issue in every Chapter 11 case where the debtor provides retiree health benefits. Accordingly, there is more than sufficient reason for this Court to grant certiorari in this case.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1710

IN RE: GENERAL DATACOMM INDUSTRIES, INC.,

Debtor

GENERAL DATACOMM INDUSTRIES, INC.,

Appellant

v.

JAMES R. ARCARA, FREDERICK R. CRONIN, ROBERT S. SMITH, and THOMAS L. THOMPSON,

Appellees

DAVID BUCHBINDER,

Trustee

On Appeal from the United States District Court
for the District of Delaware
(Civ. A. No. 02-1373)
District Judge: Honorable Kent A. Jordan

Appendix A

Argued: December 15, 2004

BEFORE: NYGAARD and GARTH, *Circuit Judges* and POLLAK*, *District Judge.*

(Filed: May 16, 2005)

OPINION

GARTH, *Circuit Judge*:

Both the Bankruptcy and District Courts here held that Appellees James R. Arcara, Frederick R. Cronin, Robert S. Smith and Thomas L. Thompson (collectively, the "Appellees") — former long-term senior executives of Appellant General Datacomm Industries Inc. and its affiliates ("DataComm") — were "retired employees" within the meaning of 11 U.S.C. § 1114 and were therefore entitled to their retiree benefits. Section 1114 of the United States Bankruptcy Code ("Bankruptcy Code") affords certain procedural protections to "retired employees" of Chapter 11 debtors. *See* 11 U.S.C. § 1114(a), (e). When applicable, these procedural protections are held to override the provisions of 11 U.S.C. § 365, which generally allow a debtor in possession, subject to the court's approval, to reject any executory contract of the debtor in order to relieve the estate of onerous and burdensome future obligations. *See* 11 U.S.C. § 365(a).

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* Honorable Louis H. Pollak, District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

The questions presented in this appeal are: (1) whether the term "retired employees," as contemplated by § 1114, encompasses the concept of "forced retirement," at least in situations where, as here, employees on the verge of voluntary retirement are strategically and deliberately terminated without cause by a debtor; and (2) if so, may DataComm's executory agreement providing benefits for retirees be rejected pursuant to 11 U.S.C. § 365. As stated, both courts rejected DataComm's attempt to terminate or otherwise modify the Appellees' retiree benefits without first complying with the mandates and procedural requirements of § 1114.

We hold that involuntary termination of employees on the verge of retirement cannot deprive such employees of the procedural protections of § 1114. Accordingly, the District Court did not err in affirming the Bankruptcy Court's order, which denied rejection of DataComm's agreement to provide such benefits.

I.

A.

The material facts on appeal are not in dispute. On or about September 4, 1997, the Board of Directors of DataComm approved a "Benefit Agreement for Long Term Senior Executive Officers and Other Senior Level Employees" (the "Benefit Plan"). DataComm originally entered into the Benefit Plan with Appellees Arcara, Cronin, and Smith. Thompson, the remaining Appellee, was added

as an Eligible Executive[1] subsequent to the establishment of the Benefit Plan.

The Benefit Plan provided for two discrete forms of benefits. First, DataComm was required to pay the annual premiums of up to $7,000 for Long Term Care insurance coverage for the lifetime of each Eligible Executive and his spouse ("Long Term Care Benefits").[2] Second, the Benefit Plan also provided that, upon retirement, each Eligible Executive and his spouse would receive, at DataComm's sole cost, a lifetime continuation of the health insurance benefits

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1. Eligible Executives included the individuals designated in the Benefit Plan (*i.e.*, Arcara, Cronin, Thompson), as well as any other senior corporate officer elected to the office of Senior Vice President or any higher office, and any other senior level employee of DataComm designated by the Board of Directors as an Eligible Executive who had been employed by the company for more than 25 years, and was 60 years of age or older. Benefit Plan ¶ 2(a).

2. "Long Term Care: Effective upon approval by the Board of Directors of this Plan, the Corporation shall pay the annual premiums of up to an annual maximum amount of $7,000 (the 'cap'), for Long Term Care insurance coverage in the amount specified in Schedule A to the Plan, for each Eligible Executive and his or her spouse for the remainder of their respective lives." Benefit Plan ¶ 3.

As more fully explained in note 13 *infra*, DataComm has waived the argument that the Long Term Care Benefits are not "retiree benefits" within the meaning of § 1114. Thus, while the issue has been raised in this appeal, we neither consider nor decide it here.

that DataComm was then furnishing to the Eligible Executive ("Retirement Health Benefits").[3]

The Benefit Plan listed at least five actions which, if taken by Eligible Executives, would lead to discharge and loss of all benefits. It essentially provided that DataComm, in its sole judgment, could effectively terminate all benefits thereunder if, among other things, the Eligible Executive violated any confidentiality agreement; disclosed any proprietary information; refused cooperation with DataComm in litigation; directly or indirectly became employed by, or purchased stock of a competitor; brought suit against DataComm (except as to claims relating to the Benefit Plan); or disparaged the company. Benefit Plan ¶ 6.[4] Aside from

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3. "Retirement Health Benefits: Upon an Eligible Executive's retirement, the Eligible Executive and his or her spouse shall thereafter receive for the remainder of the lives of the Eligible Executive and his or her spouse, a continuation of the health insurance benefits the Corporation was then furnishing the Eligible Executive, at the Corporation's sole cost." Benefit Plan ¶ 4.

4. Paragraph 6 provides:

> In the event in the sole judgment of the Board of Directors of the Corporation, an Eligible Executive or his or her spouse directly or indirectly, (i) becomes employed by or performs consulting or other services to, or becomes a director of, or makes or retains any investment in or loan to, a competitor of the Corporation (*provided* the foregoing shall not be deemed a breach if the eligible executive was unaware such entity was a

(Cont'd)

the grounds for terminating benefits specified in Paragraph 6 of the Benefit Plan, DataComm reserved no other right to rescind or amend the Benefit Plan.

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> competitor *provided* he or she promptly divests himself or herself of any such investment upon learning of such event and *further provided* the foregoing shall not apply to an investment in securities listed on a national securities exchange or NASDAQ where the aggregate investment is less than $10,000), or, (ii) violates any confidentiality or similar agreement with the Corporation or discloses or uses any confidential or proprietary information of the Corporation other than on behalf of the Corporation, or (iii) institutes or otherwise participates or assists in any litigation or proceedings against or on behalf of the Corporation, its officers or directors, (other than with respect to claims under this Plan or for salaries or fees owed by the Corporation for services actually rendered), or (iv) refuses to reasonably cooperate at the Corporation's expense, with the Corporation in the prosecution or defense of any litigation or proceeding, or (v) uses, communicates, publishes or otherwise transmits, in any manner whatsoever, negative comments regarding the Corporation or otherwise disparages the Corporation, its products, services, officers or directors, then, in any such event, the Board of Directors may terminate the status of such person as an Eligible Executive hereunder and all benefits hereunder for such Eligible Employee and his or her spouse shall terminate.

Benefit Plan ¶ 6.

Appendix A

B.

On November 2, 2001, DataComm filed for relief under Chapter 11 of the Bankruptcy Code, and pursuant to Sections 1107 and 1108 of the Bankruptcy Code, DataComm continued to possess its properties and manage its businesses as debtor(s) in possession. Thereafter, on November 19, 2001, DataComm advised the Appellees that they would be terminated on November 30, 2001, and that the Benefit Plan would be terminated on that same date.

Ten days later, on November 29, 2001, DataComm filed its motion with the Bankruptcy Court to reject the Benefit Plan pursuant to Section 365 of the Bankruptcy Code (the "365 Motion"). A day later, on November 30, 2001, the Appellees were formally terminated. DataComm concedes that the termination was without cause. At the time of their termination, the Appellees were all over 65 years of age: Thompson was 71, Cronin was nearly 70, Smith was over 68, and Arcara was near 67.

The Appellees objected to the 365 Motion, claiming that the Benefit Plan qualified for treatment under § 1114 of the Bankruptcy Code, and that DataComm was therefore required to comply with the procedural requirements of that statute before terminating or modifying the Benefit Plan. The Bankruptcy Court conducted a hearing on April 25, 2002 to determine whether § 365 or § 1114 governed the Benefit Plan. The Bankruptcy Court held that § 1114 governed, and entered an Order denying DataComm's motion to reject the Benefit Plan. The Bankruptcy Court stated that "[i]n the event . . . [DataComm] seek[s] to terminate or otherwise modify any

of the benefits of [the Appellees] provided for in the [Benefit Plan] . . . [DataComm] shall be required to first comply with the mandates and procedural requirements of 11 U.S.C. § 1114."

The District Court affirmed the decision of the Bankruptcy Court, essentially holding that the Appellees were retirees within the meaning of § 1114 because DataComm's action in terminating the Appellees the day after it purported to reject the Benefit Plan constituted a "forced retirement". This timely appeal followed.

II.

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157(b) and 1334. The District Court had appellate jurisdiction pursuant to 28 U.S.C. § 158(a)(1), and we have jurisdiction under 28 U.S.C. §§ 158(d) and 1291. Exercising the same standard of review as the District Court, "[w]e review the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re Trans World Airlines, Inc.*, 145 F.3d 124, 130-31 (3d Cir. 1998) (citing *In re Engel*, 124 F.3d 567, 571 (3d Cir. 1997); *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1223 (3d Cir. 1995)). Inasmuch as the parties agree that there are no relevant facts in dispute, our review is limited to the legal determinations of the Bankruptcy Court as affirmed by the District Court. We will thus employ a *de novo* review of those legal determinations.

Appendix A

III.

Section 365(a) of the Bankruptcy Code provides: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). (The exceptions noted in § 365 have no relevance in this case).

On the other hand, section 1114 of the Bankruptcy Code "was enacted to protect the interests of retirees of chapter 11 debtors." 7 Collier on Bankruptcy, ¶ 1114.02[1] (15th ed. 2002). That section prohibits a debtor in possession or a trustee from unilaterally modifying or terminating retirement benefits unless (1) the court orders modification or (2) the trustee and the authorized representative of the retired employees agree to modification. 11 U.S.C. § 1114(e)(1).[5]

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5. 11 U.S.C. § 1114(e)(1) provides:

> *Notwithstanding any other provision of this title*, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any *retiree benefits*, except that –
>
> (A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(Cont'd)

Appendix A

Prior to filing an application *seeking* court-imposed modification, the trustee must engage in good faith negotiations with the authorized representative of the retired employees regarding the proposed modification, and must provide the authorized representative with relevant information to allow for fair evaluation of the proposal. *Id.* § 1114(f)(1).[6] Only after the foregoing requirements have

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> (B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments
>
> after which such benefits as modified shall continue to be paid by the trustee.

(emphasis added).

6. 11 U.S.C. § 1114(f)(1) provides:

> Subsequent to filing a petition and prior to filing an application *seeking* modification of the *retiree benefits*, the trustee shall —
>
> (A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . .

(emphasis added).

been met, and such good-faith negotiations have occurred, is the court empowered to grant the modification motion, if, among other things, modification is necessary to permit reorganization of the debtor. *Id.* § 1114(g).[7] Accordingly, a debtor in possession or the trustee must continue to pay retiree benefits unless modification of such payments has been ordered by the court or the trustee and the authorized representative of the retired employees have agreed to such modification. *Id.* § 1114(e)(1).[8]

The procedural protections of § 1114 apply to "retiree benefits," which are defined with reference to the class of

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7. 11 U.S.C. § 1114(g) provides:

> The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that –
>
> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);
>
> (2) the authorized representative of the retirees has refused to accept such proposal without good cause; and
>
> (3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities . . . ,

8. *See* note 5 *supra* for the statutory text of § 1114(e)(1).

persons entitled to the benefits, *i.e.*, "retired employees."[9] As we have indicated, the overarching question here is whether the provisions of § 1114 apply to the Benefit Plan. Stated differently, the question is whether the Appellees constitute "retired employees" for purposes of invoking the protections of the statute.

DataComm's main contention on appeal is that Appellees never retired, but rather were still employed and were terminated as employees without cause. As such, DataComm argues, the provisions of § 1114, which accord protection only to "*retired employees*," never come into play here, leaving § 365 (permitting rejection of executory contracts) as the only operative statute. We are persuaded that this contention elevates form over substance, and is thus unavailing and unacceptable.[10]

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9. Section 1114(a) defines "retiree benefits" as:

> payments to any entity or person for the purpose of providing or reimbursing payments for *retired employees* and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title

(emphasis added).

10. DataComm also argues that the provisions of § 1114 do not apply here because Appellees were not retired at the time the 365 Motion [to reject DataComm's retirement Benefit Plan] was filed. As we stated, Appellees were terminated the day *after* the filing of the 365 Motion. While it is, of course, true that only retired employees can invoke the

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Moreover, as a contractual matter, we note that DataComm cannot escape its obligations under the Benefit

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protections of § 1114, *see, e.g. In re Crafts Precision Indus., Inc.*, 244 B.R. 178, 184 (1st Cir.B.A.P.2000) ("The legislative history of [§ 1114] clearly reveals that the statute is intended to benefit *retirees* specifically.") (emphasis added), we believe that this argument suffers from multiple flaws. First, it ignores the fact that DataComm had notified Appellees of their imminent termination prior to filing the 365 Motion. The argument, then, that the Appellees were still employed and not retired for purposes of determining the application of § 1114 we regard as specious. Such a result contravenes basic norms of fairness and undermines the purposes of § 1114, which "was enacted to protect the interests of retirees of Chapter 11 debtors." 7 Collier on Bankruptcy, ¶ 1114.02[1] (15th Ed.2002).

Second, it rests upon a faulty premise. DataComm's contention here is that the relevant date for determining the applicability of § 1114 is the date when the rejection of the Plan would have become effective, which in this case would be either the date immediately prior to the petition date, November 2, 2001, or, at the very latest, the filing date of the 365 Motion, November 29, 2001. This contention fails for a few reasons. Even assuming, without deciding, that the rejection of an executory contract under § 365(a) becomes effective upon the filing of the motion, *but see In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1st Cir.1995) ("[W]e hold that a rejection of a nonresidential lease under section 365(a) becomes legally effective only after judicial approval has been obtained."), that merely begs the question of whether § 365 governs the Benefit Plan in the first place. If, as Appellees maintain, § 1114 applies, then DataComm's 365 Motion was ineffective, and the decisive date of any rejection, however defined, could not occur until after the requirements of § 1114 have been satisfied.

Accordingly, we reject DataComm's contention that Appellees were still employed, rather than retired, albeit involuntarily, at the filing of the 365 Motion and therefore outside the protective ambit of § 1114.

Plan by arguing that Appellees were terminated rather than retired. As the District Court held, "retirement was the condition precedent to the Appellees' receipt of certain benefits under the [Plan], and [DataComm] prevented the Appellees from voluntarily retiring by discharging them without cause." The Benefit Plan explicitly and unambiguously states that only the particular proscribed actions by an Eligible Executive could result in the justifiable forfeiture of retirees' benefits. We believe that the District Court's reasoning was sound here — the intent of both DataComm and the Appellees was that the Appellees would receive the retirement benefits of the Plan unless they were terminated for cause. They were not. *See* 13 Williston on Contracts § 39:3 (4th ed.) ("Where a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to his or her promise to perform, or to the performance of a return promise, the promisor is not relieved of the obligation to perform. . . .").

Section 365, when it applies, allows DataComm to terminate executory contracts, with the bankruptcy court's approval, notwithstanding any contractual obligations thereunder. *See, e.g., In re Spectrum Info. Techs., Inc.*, 190 B.R. 741, 745-46 (Bankr.E.D.N.Y.1996). At issue then, is whether Congress intended the term "retired employees" in § 1114 to encompass the concept of "forced retirement."

In contending that "forced retirement" does not implicate the provisions of § 1114, DataComm relies heavily on a *reductio ad absurdum*. According to DataComm, the District Court's holding, taken to its logical conclusion, means that § 1114 would apply to a retirement health benefit when DataComm discharged an employee without cause at the age of 25.

Recognizing that the employees affected here were all over the age of 65 (Arcara 66; Smith 68; Cronin 70; Thompson 71), and were purposefully discharged only one day after DataComm filed its 365 Motion, we can only conclude that DataComm's action was taken deliberately and was designed to thwart the purposes of § 1114. Therefore, accepting the concept of "forced retirement" does not and cannot lead to the absurd result posited by DataComm that an employee could be retired at age 25 if discharged without cause. The contours of such a concept as "forced retirement" may receive appropriate interpretation, when it occurs, by a case-by-case development. What matters here is that the particular facts of this case are compelling enough to warrant the application of such a concept.

As the record reflects, the Appellees were on the verge of retirement,[11] receiving a minimal paycheck for "basically hanging around." Tr. of Bankr.Hearing at 27. They were founders and long-term senior executives of DataComm, and each was of retirement age and was qualified to warrant entitlement to the benefits prescribed by DataComm's Benefit Plan, which was designed to compensate *long-term* senior level employees. *See* Benefit Plan ¶ 2a. As such, our holding in no way countenances the 25 year old "horrible" scenario envisaged by DataComm.

Under the circumstances presented here, to allow DataComm to deliberately interfere with Appellees'

11. We note that under the Employee Retirement Income Security Act of 1974, the age of "[n]ormal retirement" is sixty-five. *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 281 n.3 (3d Cir. 1988) (citing 29 U.S.C. § 1002(24)).

retirement benefits would operate to frustrate and nullify the objectives of § 1114, which, as we have stated, was "enacted to protect the interests of retirees of Chapter 11 debtors." 7 Collier on Bankruptcy, ¶ 1114.02[1] (15th ed. 2002).

IV.

We address one final issue — an issue not raised or initially briefed by the parties. At oral argument, we asked the question whether the Benefit Plan was an executory contract for purposes of § 365 (which involves *only contracts* that are executory in substance and which are not "trumped" by § 1114) and so could be considered by the Bankruptcy Court for rejection on an appropriate application. If the Benefit Plan *was not executory*, § 365 would have no application as it could not be rejected under that section. We requested supplemental briefing on the question. After reviewing the parties' submissions, we are satisfied that the Benefit Plan is indeed an executory contract.

We set forth the controlling definition of "executory contract" in *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36 (3d Cir. 1989): "[An executory contract is] a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Id.* at 39 (citations and internal quotations omitted).

Appendix A

The crucial issue for determining whether the instant Benefit Plan was executory is whether the *Appellees* had *material* obligations that remain unperformed at the time the bankruptcy petition was filed. *See In re Columbia Gas System Inc.*, 50 F.3d 233, 240 (3d Cir. 1995) ("The time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed.") (citations omitted). Thus, our focus is on the restrictive covenant obligations of the Appellees, *i.e.*, their obligations, set forth in Paragraph 6 of the Benefit Plan (see note 4 *supra*). Paragraph 6, among other things, requires Eligible Executives: to not compete; to maintain confidentiality; to refrain from instituting litigation; to agree to participate in litigation initiated by DataComm; and to refrain from negative publicity.

While we have held that the determination of what constitutes a material breach under the *Sharon Steel* definition is governed by relevant state law, *In re Columbia Gas System Inc.*, 50 F.3d at 240 n.10, we need not look beyond the Benefit Plan itself to make that determination. The Benefit Plan expressly defines certain acts or events as constituting material breaches of the contract. It states that:

> [i]n the event in the sole judgment of the Board of Directors of the Corporation, an Eligible Executive or his spouse directly or indirectly [fails to comply with any of the covenants set forth in Paragraph 6], then, in any such event, the Board of Directors may terminate the status of such person as an Eligible Executive hereunder and all

> benefits hereunder for such Eligible Employee and his or her spouse shall terminate.

Benefit Plan ¶ 6 and note 4 *supra*.[12] Thus, if an Eligible Executive breached one of those provisions, it would excuse the future performance of DataComm. By contractual definition, therefore, such obligations are material. *See generally* Restatement (Second) of Contracts § 237 (1981) (uncured material breach by one party discharges other party's duty under contract); *see also* 23 Williston on Contracts § 63:3 (4th ed.) ("Where the contract itself is clear in making a certain event a material breach of that contract, a court must ordinarily respect that contractual provision."). We are thus satisfied that the Appellees' obligations are material, and that the Benefit Plan is an executory contract.

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12. Our dissenting colleague has discussed the issue of "materiality" at length, but he has made no reference to the very terms of the Benefit Plan itself. It is that Plan, as we have stated, which defines the "materiality" of the Appellees' obligations – it explicitly provides that the failure of an Eligible Executive to comply with the covenants of Paragraph 6 excuses the future performance of DataComm. We are satisfied that the parties intended the provisions of Paragraph 6 to be material. No further analysis is therefore required. As such, the dissenting opinion's analysis, while perhaps thorough, substitutes its own views on materiality for what the parties explicitly and formally agreed to as being "material" and vital to their contract.

We also find the dissent's reliance on *In re Columbia Gas Sys., Inc.*, 50 F.3d 233 (3d Cir. 1995), to be misplaced. That case stands for the proposition that where the remaining obligations in a contract are mere conditions, not duties, a contract cannot be considered executory for purposes of § 365. The distinction between conditions and duties, essential to the holding in *In re Columbia Gas Sys.*, is simply inapposite here.

Appendix A

V.

We conclude that deliberate and involuntary termination of an employee on the verge of retirement, where the employee has otherwise met all qualifications for retirement, cannot deprive such an employee of the procedural protections of § 1114. We therefore hold that the DataComm Appellees are "retired employees" within the meaning of § 1114. This being so, DataComm's Benefit Plan providing retirement benefits to such employees was an executory agreement and could not be rejected pursuant to § 365. Accordingly, we will affirm the judgment of the District Court in favor of the Appellees.[13]

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13. DataComm raises an additional issue for the first time on appeal — whether § 1114 applies to the Long Term Care Benefits in particular and, if it does not, whether DataComm can sever them for purposes of proceeding under § 365. DataComm's position is that the Long Term Care Benefits did not qualify as "retiree benefits" since they were payable during Appellees' employment. DataComm offers no exceptional circumstances to excuse its failure to raise this argument in the Bankruptcy Court and the District Court. *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130, 142 (3d Cir. 2001) ("Generally, barring exceptional circumstances, like an intervening change in the law or the lack of representation by an attorney, this Court does not review issues raised for the first time at the appellate level.") (citations omitted); *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir.2001) ("[A]rguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible of review in this Court absent exceptional circumstances (e.g., the public interest requires that the issues be heard or manifest injustice would result from the failure to consider such issues).") (citations omitted). Indeed, it appears that DataComm became aware of the argument only after the District Court alluded to the legal issue in

(Cont'd)

Appendix A

(Cont'd)

its order affirming the Bankruptcy Court. Although DataComm's Reply Brief claims that the District Court held that § 1114 is not applicable to the Long Term Care Benefits contained in Paragraph 3 of the Benefit Plan, it appears that DataComm has misstated the District Court's action. In fact, the District Court, in footnote 8 of its unpublished opinion, stated that it would not address the issue because it had not been raised by DataComm. We, too, express no opinion on this matter, as it has clearly been waived.

Pollak, Jr., *concurring*

I concur in the court's judgment in all but one small particular.[14] But I do not join the court's opinion.

I arrive at substantially the same end-point as the court — i.e., I agree with the court that the Bankruptcy Court and the District Court were right in disallowing DataComm's proposed rejection of appellees' Benefit Plan. But I arrive at the same destination via a different route: I do not agree with the court that 11 U.S.C. § 1114 protects the appellees from DataComm's intended unilateral rejection of the Benefit Plan; in my view, appellees are not protected by § 1114 because they were not "retired employees" — the category of persons sheltered by § 1114 — at the time DataComm undertook to terminate the Benefit Plan. However, I conclude that DataComm could not reject the Benefit Plan pursuant to 11 U.S.C. § 365, because that provision authorizes rejection of an "executory contract" and, in my view, the Benefit Plan was not an executory contract.

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14. The judgment of the Bankruptcy Court, affirmed by the District Court and now by this court, denies the motion filed by DataComm under 11 U.S.C. § 365. This I agree with. The Bankruptcy Court's judgment also enjoins DataComm from modifying appellees' Benefit Plan without following the procedures called for by 11 U.S.C. § 1114. Since, as this opinion explains, I am of the view that § 1114 does not cover appellees, I would strike that portion of the Bankruptcy Court's judgment.

Appendix A

I.

The court affirms that portion of the Bankruptcy Court order requiring DataComm to abide by the provisions of 11 U.S.C. § 1114, which provides procedural safeguards against modification of benefits for "retired employees." Adverting to the purpose of § 1114, which was "enacted to protect the interests of retirees of Chapter 11 debtors," 7 Collier on Bankruptcy, ¶ 1114.02[1] (15th ed. 2002), and pointing to appellees' termination without cause, the court holds that appellees ought to be considered retirees within the meaning of § 1114. The court's argument in favor of treating appellees as, in effect, constructive "retirees" cannot fail to strike a sympathetic chord. Nonetheless, I am not persuaded that appellees can properly be deemed as coming within the category of individuals protected by the statute.

Section 1114 is entitled, "Payment of insurance benefits to *retired employees*," *Id.* (emphasis added), signifying that it is the status of the employee, and not the nature of the benefit, that determines the scope of § 1114. The wording of § 1114 cannot be said to give definitive guidance on whether, to claim § 1114's protections, employees must have retired by the date that their employer files for bankruptcy or, alternatively, whether they must have retired by the date upon which the debtor *seeks* to terminate retiree benefits.[15]

15. Some of the statutory language can be said to support the view that the drafters had in mind scenarios in which, after filing for bankruptcy, an employer undertakes to reduce, or entirely abrogate, benefits of employees who had retired *prior* to the bankruptcy filing. Thus, § 1114(1) provides:

(Cont'd)

The relevant point for purposes of this appeal, however, is that appellees had not retired by either date: appellees were employees of DataComm when DataComm filed under Chapter 11, and they remained employees until they were dismissed one day *after* DataComm filed its 365 motion *see*king to terminate the Benefit Plan.

(Cont'd)

> This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income *for the twelve months preceding the filing of the bankruptcy petition* equals or exceeds $ 250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer *on the day before the filing of a petition under this title.*

11 U.S.C. § 1114(1) (emphasis added). A similar perspective is to be found in the legislative history; *see* Senate Report 100-119's statement that the "bill requires that such benefits, *provided to retired employees*, their spouses and dependents pursuant to a plan in effect at the time of [sic] a Chapter 11 proceeding is commenced, will *continue to be paid* when the employer *providing* those benefits files . . . a petition under Chapter 11 of the Bankruptcy Code, until or unless a modification is agreed to by the parties or ordered by the court." S. Rep. No. 100-119, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 683, 685 (May 26, 1988) (emphasis added).

On the other hand, it is not clearly apparent that Congress would have had any policy reason to exclude from the protection of § 1114 employees who had retired after the debtor-employer filed for bankruptcy but before it moved to jettison its retirement-benefits liabilities.

To be sure, the court does not argue that appellees had in fact retired by either date. Instead, it adopts the District Court's argument, which relies on the prevention doctrine, and concludes that appellees are constructive retirees who ought thus to receive § 1114's protections. The prevention doctrine states that "[i]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." 5 Williston, Contracts 677, at 224 (3d ed.1961); *see also Apalucci v. Agora Syndicate*, 145 F.3d 630, 634 (3d Cir.1998) ("when one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure."). The court argues that, since retirement was the condition precedent to receipt of benefits, and since DataComm willfully thwarted fulfillment of this condition when it dismissed appellees (who were at or near retirement age) on the day after DataComm filed its 365 Motion, appellees ought to be considered "retirees" within the meaning of § 1114.

While the pedigree and wisdom of the prevention doctrine are unquestionable, the conclusion that the court draws from it — namely, that § 1114 ought to extend to appellees — is unwarranted. The prevention doctrine entails that, where one party to a contract takes an action that prevents the other party from being able to fulfill a condition precedent to that contract, the first party may not use its own action as a mechanism for avoiding performance of its contractual obligations. The prevention doctrine does not entail that, as a result of the first party's culpable obstruction,

that party is not entitled to avoid performance of its obligations for *any* reason. There may well be reasons other than the failure of the condition precedent that would allow the first party to withdraw permissibly from the duties it contracted to perform.

Applying the prevention doctrine here signifies that DataComm could not use the fact that appellees had not retired as a ground for withdrawing from its obligation to pay retiree benefits, since DataComm, by firing appellees, prevented them from retiring on the day of their dismissal or at any subsequent time. On the basis of the prevention doctrine, then, the Benefit Plan remained in place despite appellees' non-retirement. But there might have been other reasons lending support for DataComm's asserted entitlement to withdraw. (Indeed, DataComm claims that § 365 provides one such reason.) Thus, the prevention doctrine does not lead to the conclusion that appellees are (or ought to be treated as) retirees or the conclusion that § 1114 ought to apply to appellees. The prevention doctrine can do no more than return the parties to the situation that existed prior to appellees' dismissal. Since, for the reasons advanced above, that situation cannot be characterized as one in which appellees had retired, the prevention doctrine does not afford appellees the protections of § 1114.

In sum, § 1114 applies only if the beneficiaries of the agreement in question have retired before their employer seeks to terminate or otherwise modify that agreement. Since that is not the situation here, I conclude that § 1114 is inapplicable.

II.

The court finds that § 1114 applies to appellees and trumps 11 U.S.C. § 365. Accordingly, the court holds that the protections conferred by § 1114 prohibit rejection of the Benefit Plan pursuant to § 365, and require compliance with the terms of § 1114 prior to any modification of the Plan. I agree that DataComm may not reject the Benefit Plan, but I rest this conclusion on the ground that the Benefit Plan was not an "executory contract," and hence fell outside the coverage of § 365.[16]

An executory contract is " 'a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.' " *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 39 (3d Cir.1989) (citing V. Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973)). Thus, for purposes of ascertaining the nature of the Benefit Plan, the relevant question is whether the obligations enumerated in Paragraph 6 of the Plan, which requires that the Plan's beneficiaries forbear from competing with or disparaging the company, are *material*.

State law determines whether breach of a contract provision is material. *See*, e.g., *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. 1992). Delaware, where the

16. *See* 11 U.S.C. § 365 ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.").

underlying dispute arose, incorporates the test of materiality found in the Restatement. *See BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003); *SLMsoft.com, Inc. v. Cross Country Bank*, 2003 Del. Super. LEXIS 112, 51-52 (Del. Super. Ct. 2003). To define "materiality," the Restatement provides a list of "circumstances" deemed to be "significant" in an assessment of "whether a failure to render or to offer performance is material," Restatement (Second) of Contracts § 241:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Id.*

Taking these circumstances one by one, I conclude that the balance of considerations lies on the side of non-materiality:

a) *Benefit reasonably expected from the agreement*: While DataComm likely expected adherence to the restrictions encompassed in Paragraph 6, it would have harbored this expectation prior to and independent of the Benefit Plan. Some of the obligations contained in this Paragraph simply incorporate prior agreements — for example, the confidentiality agreements in clause (ii)[17] — and it would be these earlier agreements that justified the expectation. Other obligations are so intertwined with the executives' pre-existing duties of good faith and loyalty — e.g., forbearance from investing in a competitor (clause (i)) or disparaging the company (clause (iii)) — that, here too, DataComm's expectation would not have been rooted in the Benefits Plan. In sum, since DataComm would have received the benefit flowing from appellees' performance of these obligations independent of the Benefit Plan, it does not make sense to consider that performance a benefit that DataComm reasonably expected from the agreement. Or, to put the point in the terms the Restatement uses, performance of the obligations was not a benefit of the agreement.

b) *Adequacy of Compensation*: The Restatement states that "[t]he second circumstance, the extent to which the injured party can be adequately compensated for his loss of benefit (Subsection (b)), is a corollary of the first." § 241 cmt. c. For the reasons set forth in the previous paragraph, then,

17. Clause (ii) of Paragraph 6 references "violat[ions] of any confidentiality or similar agreements with the Corporation . . ."

this circumstance also does not support a finding of materiality.

c) *Forfeiture*: The Benefit Plan permits DataComm to terminate the Plan's benefits in the face of an eligible executive's breach of Paragraph 6; it does not state that termination will automatically follow. The fact that an executive could fail to comply with one of the restrictions in Paragraph 6 and still continue to receive the benefits package further supports a finding that the restrictions are not material.

d) *Likelihood of cure*: In describing this circumstance, the Restatement states that "[t]he fact that the injured party already has some security for the other party's performance argues against a determination that the failure is material." § 241 cmt. e. Here, DataComm would have had some security for the executives' adherence to Paragraph 6: Again, some of the obligations contained there (e.g., obligations of confidentiality) hinge upon prior agreements, breach of which may entail penalties rooted in those agreements. Similarly, legal sanctions for breach of the duty of loyalty would motivate adherence to some of the other restrictions (e.g., those against competition and disparagement).

e) *Good faith and fair dealing*: The Restatement states that "[a]dherence to the standards stated in Subsection (e) is not conclusive, since other circumstances may cause a failure to be material in spite of such adherence. Nor is non-adherence conclusive, and other circumstances may cause a failure not to be material in spite of such non-adherence." § 241 cmt. f. In other words, this is a less probative consideration than the others. In the absence of an actual breach of Paragraph 6

by any of the appellees, the implications of this consideration for the materiality of the appellees' obligations would be purely speculative.

In sum, the circumstances supporting a finding of materiality do not appear to be present here.

More generally, we can distill from the Restatement's list the defining feature of materiality — *viz.*, the connection between materiality and consideration. More to the point, the Restatement will deem one party's obligation material where it serves as consideration for the other party's promised performance. *Compare Frank Felix Assocs. v. Austin Drugs*, 111 F.3d 284, 289 (2d Cir.1997) ("Under New York law, for a breach of a contract to be material, it must go to the root of the agreement between the parties.") (citation omitted). Thus, the first element of § 241 of the Restatement is "the extent to which the injured party will be deprived of the benefit which he reasonably expected," and "the benefit which he reasonably expected" is the consideration that the contract provides, § 241; *see also* § 241 cmt. b ("Since the purpose of the rules stated in §§ 237 and 238 is to secure the parties' expectation of an exchange of performances, an important circumstance in determining whether a failure is material is the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange (Subsection (a)). If the *consideration* given by either party consists partly of some performance and only partly of a promise (see Comment *a* to § 232), regard must be had to the entire exchange, including that performance, in applying this criterion.") (emphasis added); § 81 ("In most commercial bargains the consideration is the object of the promisor's

desire and that desire is a material motive or cause inducing the making of the promise, and the reciprocal desire of the promisee for the making of the promise similarly induces the furnishing of the consideration."). *Cf. id.* at § 162 cmt. c. ("a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent . . . [or] if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent."). Indeed, the Reporter's notes to the chapter of the Restatement containing § 241 explain that the term "failure of performance," when used in that chapter, *see, e.g.*, id. at §237,[18] replace the term "failure of consideration." *See* Restat. (2d) Contracts, ch. 10, Introductory Note. In sum, a party's obligation to perform or forbear will be material if it functioned as consideration, or as the reason inducing the other party's entry into the contract.

It seems improbable that the obligations contained in Paragraph 6 functioned in some significant way as consideration for the benefits conferred by the Benefit Plan. The appellees' obligations are set forth in the Benefit Plan in a manner that appears to make them subsidiary to the Plan's

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18. Section 237 qualifies the phrase "failure of performance" with the word "material." *see id.* ("it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured *material failure* by the other party *to render any such performance* due at an earlier time.") (emphasis added). Section 241 also pertains to material failures of performance (i.e., what were formerly referred to as "failures of consideration"), although its language is somewhat more elaborate. *See* § 241 (describing "whether a failure to render or to offer performance is material.").

central purpose. More specifically, the bulk of this eight-paragraph contract is devoted to setting forth DataComm's obligations (Paragraphs 3, 4 and 7), describing the benefits that the eligible executives will receive (Paragraphs 3 and 4), and specifying the protections available to these executives in the event that DataComm undergoes a change in control (Paragraph 5).[19] Paragraph 6 is the only paragraph addressing the executives' obligations; it sets forth a list of restrictions on the eligible executives' conduct, but it does so by embedding this list within a provision stating that DataComm may terminate the benefits of an executive who fails to fulfill one of these obligations. This placement of appellees' obligations suggests that appellees' forbearance is not what motivates or compensates DataComm's performance. Instead, the Plan memorialized a promise by DataComm to furnish its long-standing executives with certain benefits.

Indeed, the Plan's preamble amply supports this reading, as it contains language signifying that the purpose of the Plan is to compensate appellees for their past years of service to DataComm. *See* App. at 44 ("WHEREAS, the Corporation desires to provide to certain of its employees (the 'Eligible Executives') with [sic] certain additional benefits *based upon their many years of service to the Corporation*") (emphasis added). The preamble makes no mention of an intent to secure

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19. The remaining paragraphs specify the names of the eligible executives (Paragraph 1), define terms used in the Plan (Paragraph 2), permit DataComm to terminate an executive's benefits in the event that he violates a restriction described in the Agreement (Paragraph 6), and provide for the severability of any provision deemed unenforceable (Paragraph 8).

appellees' compliance with the restrictive provisions of Paragraph 6, or to otherwise bind appellees in any way. The real crux of the agreement, then, is a commitment undertaken by DataComm to reward appellees' for past consideration.

Finally, Third Circuit precedent further supports a finding that the obligations set forth in Paragraph 6 are not material. In *Enterprise Energy Corp. v. United States* (*In re Columbia Gas Sys.*), 50 F.3d 233 (3d Cir. 1995), this court appealed to the Restatement to evaluate materiality:

> In order to determine the materiality of the class members' obligations, we turn first to basic contract principles. There is a distinction in the law between failure of a condition and a breach of a duty: 'Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.' Restatement (Second) of Contracts § 225(3) (1981). This distinction between a condition and a duty (or promise) is important here. The Restatement makes clear that while 'a contracting party's failure to fulfill a condition excuses performance by the other party whose performance is so conditioned, it is not, without an independent promise to perform the condition, a breach of contract subjecting the nonfulfilling party to liability for damages.' *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 460 N.E.2d 1077, 1081-82, 472 N.Y.S.2d 592 (N.Y. 1984) (citing Restatement (Second) of Contracts § 225).

50 F.3d at 241 (footnotes omitted).[20] *Columbia Gas* greatly clarifies the nature of appellees' obligations under the Benefit Plan. Paragraph 6 permits DataComm to terminate an executive's benefits should that executive have been found to have violated one of the listed restrictions. In other words, a breach by one of the appellees would excuse continued performance by DataComm. However, such a breach would not, by itself,[21] subject the "nonfulfilling" executive to liability for damages. Accordingly, the appellees' obligations should be *seen* as conditions, and not duties. And, "if the remaining obligations in the contract are mere conditions, not duties, then the contract cannot be executory for purposes of § 365 because no material breach could occur." *Id.* at 241.

For the foregoing reasons, I conclude that the Benefit Plan was not executory. Since section 365 permits rejection only of those contracts that are executory, I would affirm denial of appellants' 365 Motion on the ground that section 365 does not apply to the contract at issue. Accordingly, I concur in judgment of the court, subject to the small reservation noted in footnote 14, *supra*.

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20. As the *Columbia* court noted, "[t]he Restatement has dropped the term 'condition precedent' in favor of simply stating it as 'condition.' E. Allen Farnsworth, 2 Farnsworth on Contracts § 8.2, at 349 (1990)." 50 F.3d at 241 n. 15.

21. The confidentiality agreements cited in the Plan or the doctrine of loyalty might have subjected an executive who breached his duty of confidentiality or loyalty to liability, but this consequence would have emerged from a legal relationship that existed independent of the relationship forged by the Plan.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED FEBRUARY 24, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11

Bankruptcy Case No. 01-11101-PJW

IN RE:

GENERAL DATACOMM INDUSTRIES, INC., et. al.,

Debtors.

Civil Action No. 02-1373-KAJ

GENERAL DATACOMM INDUSTRIES, INC., et. al,

Appellants,

v.

JAMES R. ARCARA, FREDERICK R. CRONIN, ROBERT S. SMITH, and THOMAS L. THOMPSON,

Appellees.

Appendix B

MEMORANDUM ORDER

I. Introduction

Presently before the court is an appeal by General Datacomm Industries Inc. and its affiliates (the "Appellants") from the July 9, 2002 Order by the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") denying Appellants' motion to reject the executory contracts of James R. Arcara, Frederick R. Cronin, Robert S. Smith and Thomas L. Thompson (collectively the "Appellees")[1] pursuant to Section 365 of the Bankruptcy Code. (D.I. 1.) Also before the court is the Appellants' motion to strike portions of the Appellees' answering brief. (D.I. 10.) The court has jurisdiction over this case pursuant to 28 U.S.C. § 158(a). For the reasons that follow, the decision of the Bankruptcy Court that is the subject of this appeal (D.I. 1) is affirmed, and the Appellants' motion to strike (D.I. 10) is denied.

II. Background

On November 2, 2001, the Appellants filed for relief under Chapter 11 of the Bankruptcy Code, and pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Appellants continued to possess their properties and manage their businesses as debtors in possession. (D.I. 8 at 3.) On November 19, 2001 the Appellants advised the Appellees that they would be terminated on November 30, 2001, and

1. The Appellees were senior executives of the Appellants, serving in various capacities as officers, directors, and/or managers of Appellants day-to-day business operations. (D.I. 8 at 4.)

that the employee benefit agreements they entered into with the Appellants (the "Agreements")[2] would be terminated on the same date. (D.I. 9 at 5.) Under the Benefit Agreements, the Appellants were required to pay the annual premiums of up to $7,000 for long term care insurance coverage for the lifetime of each Appellee and his spouse ("Long Term Care Benefits").[3] (*Id.* at 4.) The Agreements also provided that, upon retirement, each Appellee and his spouse would receive, at the Appellants' sole cost, a lifetime continuation of the health insurance benefits that the Appellee was then receiving ("Retirement Health Benefits").[4] (*Id.*) On November 29, 2001, the Appellants filed their Motion with the Bankruptcy Court to reject the Agreements pursuant to Section 365 of

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2. While I use the term Agreements throughout this Order, it is unclear whether each Appellee entered into a separate Agreement with the Appellants, or whether there was just one Agreement that established benefits for each Appellee. The Appellants use the term "Agreements" (D.I. 8 at 2) and the Appellees use the word "Plan" (D.I. 9 at 2). (*See also* D.I. 3 at Ex. 2.)

3. "*Long Term Care*: Effective upon approval by the Board of Directors of this Plan, the [Appellants] shall pay the annual premiums of up to an annual maximum amount of $7,000 (the "cap"), for Long Term Care insurance coverage in the amount specified in Schedule A to the Plan, for each Appellee and his or her spouse for the remainder of their respective lives." (D.I. 3 at Ex. 2.)

4. "*Retirement Health Benefits*: Upon an [Appellees'] retirement, the [Appellee] and his or her spouse shall thereafter receive for the remainder of the lives of the [Appellee] and his or her spouse, a continuation of the health insurance benefits the [Appellant] was then furnishing the [Appellee], at the [Appellants] sole cost." (DI. 3 at Ex. 2.)

the Bankruptcy Code[5] (the "365 Motion"), and on November 30, 2001, the Appellees were terminated. (*Id.* at 5; D.I. 8 at 4.)

The Appellees objected to the 365 Motion, claiming that the Agreements qualified for treatment under Section 1114 of the Bankruptcy Code[6] ("Section 1114") and that the

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5. Section 365 allows a debtor in possession, subject to the court's approval, to reject any executory contract of the debtor in order to relieve the estate of onerous and burdensome future obligations. *See* 11 U.S.C. 365(a); *In re Spectrum Info. Techs., Inc.* 190 B.R. 741, 745 (Bankr. E.D.N.Y. 1996).

6. 11 U.S.C. 1114(e) provides:

> Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any *retiree benefits* . . .

(emphasis added).

11 U.S.C. 1114(f)(1) provides:

> Subsequent to filing a petition and prior to filing an application seeking modification of the *retiree benefits*, the trustee shall — make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary

(Cont'd)

Appellants were therefore required to comply with the procedural requirements of that statute before terminating or modifying the Agreements. (D.I. 9 at 6.) The Bankruptcy Court conducted a hearing on April 25, 2002 to determine whether Section 365 of the Bankruptcy Code ("Section 365") or whether Section 1114 governed the Agreements. (D.I. 3 at Ex. 4.) The Bankruptcy Court held that Section 1114 governed (*Id.*), and entered an Order denying Appellants' 365 Motion, stating that "[i]n the event the [Appellants] seek to terminate or otherwise modify any of the benefits of [the Appellees] provided for in the [Agreements] . . . the [Appellants] shall be required to first comply with the mandates and procedural requirements of 11 U.S.C. § 1114." (D.I. 3 at Ex. 5.) The Appellants filed a Notice of Appeal to this court on July 17, 2002. (D.I. 1.)

III. Standard of Review

On appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir.1999). When reviewing mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but

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> modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . .
>
> (emphasis added).

exercises 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir.1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir.1981)).

IV. Discussion

The Appellants argue that the Bankruptcy Court erroneously ordered them to comply with the mandates and procedural requirements of Section 1114 before modifying or terminating the Appellees' Agreements because Section 1114 applies only to "retired employees,"[7] and the Appellees were not retired as of the date the 365 Motion was filed. (D.I. 8 at 5-6.) The Appellants contend that it is undisputed that the Appellees were current employees of the Appellants and were being paid for their employment on the date the 365 Motion was filed, and under the "plain" meaning of the

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7. Appellants point out that retiree benefits are defined in Section 1114(a) as:

> payments to any entity or person for the purpose of providing or reimbursing payments for *retired employees* and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund or other program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title

(emphasis added).

word retired, this means that they were not retired. (*Id.* at 6.) The Appellants argue that Section 1114 is therefore inapplicable to their 365 Motion, and that the Order by the Bankruptcy Court denying their 365 Motion should be reversed. (D.I.13 at 4.)

In order to properly address the Appellants' claims, I must address the substance of the Bankruptcy Court's bench ruling at the April 25, 2002 hearing. At that hearing, the Bankruptcy Court explained that even though the Agreements "could be viewed as . . . executory contract[s] covered by Section 365," Section 365 was inapplicable because the language "notwithstanding any other provision of this title" in Section 1114(e)(1) applies to and "overrides [Section] 365 with respect to retiree benefits." (D.I. 3, Ex. 4 at 36.) The Bankruptcy Court then analyzed the Long Term Care Benefits and Retirement Health Benefits provided in the Agreements. With respect to the Long Term Care Benefits, the Bankruptcy Court found that these "were being paid by [the Appellants] during the term of [the Appellees'] employment, [and were] not triggered by a retirement. So at least as to [the Long Term Care] benefits, it seems to me that the [Appellants] cannot avoid that obligation." (*Id.* at 37-38.)

After noting the absence of a definition of the term "retire" in the Agreements, the Bankruptcy Court then articulated several reasons for finding that the Appellees' were entitled to the Retirement Health Benefits even though they had been terminated. (D.I. 3, Ex. 4 at 38.) First, the Bankruptcy Court stated that since the Appellees had "a long [employment] history with the [Appellants,] and the agreement[s] identif[y] these people as having had a long

history with the [Appellants], . . . then I think it's fair that the company has forced their retirement. . . ." (Id.) Second, the Bankruptcy Court gave weight to the fact that the Appellees were terminated without cause. "If [Appellees] were terminated for cause, then I think you might have an argument that the [retirement] benefits would not be triggered. But since . . . it's agreed that they were terminated without cause, I conclude that they should be entitled to . . . [the] retirement benefits as contemplated by the agreement[s]." (*Id.* at 39.) Finally, the Bankruptcy Court found that the Benefit Agreements were "binding upon the [Appellants] and its successors and assigns" and since "there was no reservation of rights to amend or repeal th[ese] agreement[s,] . . . it seems . . . the intent was [that] on retirement [the Appellees] would be entitled to the benefits." After re-summarizing these findings, the Bankruptcy Court stated, "I conclude that [the Appellees] are eligible for these benefits. I conclude that the matter is not covered by Section 365 and it is covered by Section 1114." (*Id.*)

Because the Bankruptcy Court's holding includes mixed questions of law and fact, I will apply the clearly erroneous standard of review to the Bankruptcy Court's findings of fact and will review the Bankruptcy Court's findings of law *de novo*. As a matter of fact, the Bankruptcy Court found that retirement was not required in order for the Appellees to receive the Long Term Care Benefits because they qualified for these benefits when the Agreements were approved by the Appellants' Board of Directors. (D.I. 3, Ex. 4 at 37-38.) The Bankruptcy Court also found, as a matter of fact, that the Appellees were terminated without cause, that the Appellees gave many years of valuable service to the

Appellants, that the Retirement Health Benefits were contractually binding on the Appellants and its successors in interest, and that the benefits contained in the Agreements were unable to be amended or repealed. (*Id.* at 38.) These findings by the Bankruptcy Court are supported by the record and are not clearly erroneous.

As a matter of law, the Bankruptcy Court found that, absent a definition of retirement in the Agreements, and because of their many years of service to the Appellants, the Appellees were, in effect, forced into retirement. The Bankruptcy Court held that this forced retirement, together with the Appellees' termination without cause and the Appellants' intent that the Appellees receive the Retirement Health Benefits, entitled the Appellees to these benefits as a matter of contractual right. Because the term "retire" was not defined in the Agreements, and could be interpreted to mean "voluntary retirement" as the Appellants argue or discharge as the Appellees argue, I must determine whether the Agreements are ambiguous.

> In determining whether a contract is ambiguous, the court assumes the intent of the parties to an instrument is embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement. This does not mean, however, that the court is confined to the four corners of the written document. Rather, the court reads the contract in the context in which it was made. Therefore, to determine the parties' intentions, the court may consider, among other

> things, the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.

Pacitti v. Macy's, 193 F.3d 766, 773 (3d Cir. 1999) (quotations and citations omitted).

"[T]he 'prevention' doctrine' provides that a party may not escape contractual liability by reliance upon the failure of a condition precedent where the party wrongfully prevented performance of that condition precedent." *Mobile Communications Corp. of Am. v. MCI Communications Corp.*, 1985 WL 11574 at *4 (Del. Ch. Aug. 27, 1985). *See also T.B. Cartmell Paint & Glass Co. v. Cartmell*, 186 A. 897, 903 (Del. Super. 1936) (stating that "[i]t is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned"). Here, retirement was the condition precedent to the Appellees' receipt of certain benefits under the Agreements, and the Appellants prevented the Appellees from voluntarily retiring by discharging them without cause. Because the Appellees were not allowed to voluntarily retire, and because, by way of termination, they were forced into retirement, I hold that the Appellees are retirees within the meaning of Section 1114. Accordingly, as the Bankruptcy Court held, the Appellants must comply with the procedures of Section 1114. *See In re GF Corp.*, 115 B.R. 579, 583 (Bankr. N.D. Ohio 1990).[8]

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8. The Bankruptcy Court ordered the Appellants to comply with the requirements of Section 1114 before terminating "any" of the

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Appendix B

Given the express language in the Agreements that the Retirement Health Benefits were binding on the Appellants and unable to be modified by successors in interest, and because the Agreements prescribed that competition, disparagement or legal action against the company were the only circumstances under which benefits could be terminated, I find that the Agreements are unambiguous. The intent of both the Appellants and the Appellees was that the Appellees would receive the Retirement Health Benefits unless they were terminated for cause. Since the Appellees were not terminated for cause, I affirm the Bankruptcy Court's holding that the Retirement Health Benefits were contractually protected in a situation of forced retirement and that the Appellees are entitled to these benefits.

The Bankruptcy Court also held that the Appellants must comply with the mandates and procedural requirements of Section 1114 before the Appellants could modify the Agreements. (D.I. 3 at Ex. 5). As discussed, the Appellants emphasize that the Appellees were not retired on the date the 365 Motion was filed, and because Section 1114 only governs retired employees, the Appellants argue that the

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benefits in the Agreements. (D.I. 3 at Ex. 5.) At the hearing, the Bankruptcy Court ruled that retirement was not needed to trigger Long Term Care Benefits. (D.I. 4, Ex. 4 at 37-38). If retirement is not required in order for the Appellees to receive the Long Term Care Benefits, it would appear that Section 1114 is inapplicable to these benefits. However, the Appellants have not argued that they should be allowed to sever these benefits from the Agreements and eliminate them without complying with Section 1114. Because the Appellants have not raised this issue, I do not need to address it.

Bankruptcy Court erroneously applied Section 1114 to "current, non-retired employees." (D.I. 8 at 9.) However, the fact that the Appellees were not retired at the time of the 365 Motion is irrelevant in determining the application of Section 1114.

Section 1114(f)(1) requires the trustee (or debtor) to make a proposal to the retirees' authorized representative, which provides for modifications in the retiree benefits necessary to permit the debtor's reorganization, to negotiate with the authorized representative in good faith regarding the proposed modifications, and to provide the authorized representative with relevant information necessary to evaluate the proposal "subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits." Although the timing of when the employees must be retired in order to qualify for the Section 1114 protections is not addressed in Section 1114, since "retiree benefits" means payments to "any entity or person for the purpose of providing or reimbursing payments for *retired employees* and their spouses and dependants" (emphasis added), it follows that the employees must be retired before the proposal is made to the class representative.

Here, the Appellants do not argue and cannot argue that their 365 Motion satisfied the proposal or application requirements of Section 1114 at the time the motion was made. Moreover, the Appellees were retired at the time the Bankruptcy Court ordered the Appellants to comply with Section 1114 by submitting a proposal to the Appellees' class representative. Therefore, the fact that the Appellees were not retired at the time of a 365 Motion is irrelevant for

determining whether the Bankruptcy Court properly required the Appellants to comply with Section 1114 before terminating the Appellees retirement benefits.

However, the fact that the Appellees were terminated the day after the Appellants filed the 365 Motion and that, by way of termination, the Appellees were "retired" the day after the 365 Motion was filed is relevant for determining the application of Section 1114. The Appellants' motion to eliminate the retirement benefits one day before forcing retirement of the Appellees appears to be an attempt to bypass Section 1114, and such an action is not consistent with the statute, which "was enacted to protect the interests of retirees of Chapter 11 debtors." *See 7 Collier on Bankruptcy*, ¶ 1114.02[1] (15th ed. 2002). By way of termination, the Appellees were retirees at the time the Bankruptcy Court considered whether Section 1114 or Section 365 applied. Accordingly, the Bankruptcy Court correctly held that subjecting the Appellants to the procedural safeguards of Section 1114 was proper.

In addition to its appeal, the Appellants bring a motion to strike portions of the Appellees' answering brief and seek an order "striking (i) any and all factual representations that were included in the Answering Brief and not included in the Designated Record and (ii) any and all legal assertions or arguments made by the Appellees in the Answering Brief, to the extent such assertions or arguments rely on facts not included in the designated record." Because the references challenged by the Appellants were not relevant in deciding their appeal, I have not relied on them in holding that the Appellants are required to comply with Section 1114 before modifying the Agreements.

Appendix B

V. Conclusion

Accordingly, IT IS HEREBY ORDERED that the decision of the Bankruptcy Court which is the subject of Appellants' appeal (D.I. 1) is AFFIRMED and the Appellants' motion to strike (DJ. 10) is DENIED.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

February 24, 2003
Wilmington, Delaware

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE DATED JULY 9, 2002

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 01-11101 (PJW)

(Jointly Administered)

Re: Docket No. 74

In re:

GENERAL DATACOMM INDUSTRIES, INC., et al.,

Debtors.

ORDER DENYING DEBTORS' MOTION TO REJECT CERTAIN EXECUTORY CONTRACTS PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE

AND NOW, this 9 day of July, 2002, having considered the Debtors' Motion to Reject Certain Executory Contracts Pursuant to Section 365 of the Bankruptcy Code (the "Motion") (D.I. 74); and having considered any and all responses or objections thereto; and having held a hearing and argument on the Motion; and finding cause to deny the Motion; it is hereby **ORDERED** as follows:

Appendix C

1. The Motion is hereby **DENIED** in its entirety as to the Former Employees (defined below).

2. In the event the Debtors seek to terminate or otherwise modify any of the benefits of James R. Arcara, Frederick R. Cronin, Robert S. Smith and Thomas L. Thompson or other similarly situated individual(s) (collectively, the "Former Employees") provided for in the Benefit Agreement for Long Term Senior Executive Officers and Other Senior Level Employees of General DataComm Industries, Inc. ("GDC"), dated September 4, 1997 ("Plan"), the Debtors shall be required to first comply with the mandates and procedural requirements of 11 U.S.C. § 1114.

3. Notwithstanding the entry of this Order, the Debtors right to challenge whether or not any of the Former Employees are eligible executives under the Plan is preserved and not affected.

s/ Peter J. Walsh
Peter J. Walsh
Chief United States Bankruptcy Judge

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF HEARING DATED APRIL 25, 2002

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Bankruptcy #01-11101(PJW)

April 25, 2002
11:01 a.m.
Wilmington, DE

IN RE

GENERAL DATACOMM INDUSTIES, INC., et al,

Debtors

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

* * *

MR. MALFITANO: Good morning, Your Honor. Joe Malfitano from Young, Conaway on behalf of the debtors. Your Honor, I'm going to be handling number 7 on the agenda. Yesterday, Your Honor, I did send over a letter that was signed by myself and counsel for the former employees, represented by Ricardo Palacio, who is in the court. And, in the letter we had a series of stipulated facts and really what the stipulated issue would be for Your Honor today. If Your Honor would like, I can run through the stipulated facts on the record or we can just move to have that letter moved into evidence and just hear oral argument on the issue.

THE COURT: Okay. Well, unfortunately, I made some markings on the letter.

MR. MALFITANO: I have another copy, Your Honor.

THE COURT: Okay. Why don't you do that and we'll admit it as an exhibit. Okay.

MR. MALFITANO: Your Honor, would you like to proceed just with argument on the issue?

THE COURT: Yes.

MR. MALFITANO: Okay. This is a case where the debtors really did everything right. They filed voluntary petitions on November 2nd, 2001 and immediately began reviewing contracts and leases to determine what the benefit of those contracts and leases were to the estates.

After review of the contracts and leases, the debtors filed a series of omnibus objections, four to be exact, to alleviate the administrative burden that was being placed on the estates. The motion that we are here on today is the debtors' first omnibus rejection motion out of the four. And, many of the contracts that were listed on the exhibit to the first omnibus objection have already been rejected pursuant to an order of this Court. The remaining contracts are those of the employees that are really the subject of this hearing.

As a further backdrop, I think the Court should be aware that the benefit agreements that we're talking about here are really agreements that are with senior executives of the company, they're not agreements with the worker bees of

the company, the people who come in 9 to 5 and work on behalf of the debtors.

As the stipulation was submitted to Your Honor yesterday, hopefully it makes it clear that the issue for Your Honor is very narrow and very straightforward. In their objection the employees claim that in order for the debtor to terminate the benefit agreements they have to run through the strict requirements set forth in 1114 of the Bankruptcy Code. However, the debtors would submit that the employees' reliance on Section 1114 of the Bankruptcy Code is misplaced.

Under the plain meaning of Section 1114 you need two facts before you even get to that section. And, the first fact is you need a retired former employee. In this case, the employees have failed to even meet that first prong of the provision there. There's no retired employees in this case. The employees were not retired as of the date of the motion, they're not retired as of this date. In fact, the employees were actively employed and were receiving wages up until November 30th, 2001. And, in one case, one of the employees, James Arcara, actually worked for the debtors up until early January, and was receiving wages on his work for that as well.

Now, the code does not define who is a retired former employee in Section 1114, but if we look just to the plain meaning of the word retirement, I think it's clear that the employees that we're talking about here are not retired. Black's Law Dictionary defines retirement as "a voluntary termination of one's own employment, especially upon

reaching a certain age." In this case it's undisputed the employees were terminated by the debtors on November 30th, in one case, I believe it was January 6th for Mr. Arcara. The employees did not voluntarily terminate —

THE COURT: Were they terminated without cause or with cause?

MR. MALFITANO: I believe, Your Honor, they were terminated without cause because it was really just one of those things where the people were receiving a paycheck for being — basically hanging around. They were old founders of the company, senior executives who kind of came in, collected a paycheck. And after the bankruptcy was filed, the debtors determined that they needed to alleviate some of these costs that were just not worth having.

The employees were actually notified on November 19th, as the stipulation of facts show, that the benefit agreements that we're talking about were going to be terminated as of November 30th as well. The employees are arguing in this case that their termination is, in effect, a retirement and, therefore, they should be subject — the debtors should be subject to 1114.

And, Your Honor, I would submit that that argument really has no merit. The terms retirement and termination are not one and the same, actually they're completely opposite. As such, the debtors would submit that Section 1114 of the Bankruptcy Code has no application to these facts and requests that Your Honor dismiss this last ditch effort by these senior executives to squeeze a little bit more money out of

debtors' estate, and grant the motion to reject these benefit agreements under Section 365.

THE COURT: You said there were two facts that were needed to apply 1114. One was you had to have a retired employee. What was your other one?

MR. MALFITANO: The second fact, Your Honor, is that the benefits under the agreements have to be of the same character that are expressed in 1114, which are actually defined in the section. We've agreed that if 1114 does apply, those benefit agreements and the benefits provided thereunder would be the type and character under 1114. But I don't think we'd get there, because we don't have a retired former employee. And, if you look at the legislative history of Section 1114, this section was enacted to protect those employees who were retired as of the petition date, so their benefits were not just terminated after the petition date.

MR. PALACIO: Good morning, Your Honor. Ricardo Palacio of Ashby & Geddes on behalf of what has been noted as the former employees. They are James R. Arcara, Frederick R. Cronin, Robert S. Smith, Thomas L. Thompson, all four of whom are the beneficiaries under that certain benefit agreement for long term senior executive officers and other senior level employees' benefit agreement. And, hereafter I'll define — excuse me, refer to both the individuals as the former employees and the benefit plan as the benefit plan.

Your Honor, before I step any further into argument here, I would like to make a couple comments with respect to those comments, arguments if you will, made by Mr. Malfitano.

Appendix D

First, Your Honor, Mr. Malfitano referenced the fact that one of the prerequisites for application of 1114D is that you have a retired, former employee. Well, I read 1114D and I don't see anywhere in there that it says, retired, former employee. There's reference to a retired employee. So I think the imposition or the reading in of the word "former" is just not found under 1114D or 1114 as a whole, excuse me.

Also, Your Honor, the point that Mr. Malfitano raises with respect to the fact that this is senior management and not your blue collar worker is of no moment. In our papers we cite the *New York Trap Rock Corporation* case where the Court expressly found that senior management and the retirement where they — to which they had the benefit of clearly applied. So, again, that argument there in and of itself is of little moment.

Your Honor, we believe 1114 does apply in this case. And, I also will make an argument at the end that to the extent Your Honor believes 1114 doesn't apply, there's a 365 threshold issue that we need to address. But proceeding along 1114, Your Honor, I think the language makes clear, and I don't need to burden the Court with reading it, but I will refer Your Honor to Section 1114D. And, it talks about making payments with respect to retiree benefits. Now a lot — there's been argument already made that look, you have to have a retired employee before this kicks in. I just simply disagree. I think that the language of 1114 specifically talks of retirement benefits and even the legislative history, which Mr. Malfitano directed Your Honor to, is clear in that regard.

Appendix D

Under the Senate report, with respect to the passage and enactment of 1114, it is clear, and I quote from that Senate report, "Section 1114 makes it clear that when a Chapter 11 petition is filed, retiree benefit payments must be continued without change until and unless a modification is agreed to by the parties or by the Court. Section 1114E1 rejects any other basis for Trustees to cease or modify retiree benefit payments." So what we're looking at here is as of the petition date were the retiree benefit payments being made? Yes. 1114 makes expressly clear, and again, amply supported by the legislative history, that if you seek to alter those payments in any shape, form or fashion, you need to comply with the requirements of 1114. There's just no other basis to go around doing that.

THE COURT: Did you just say benefits were being paid at the petition date?

MR. PALACIO: Yes. I think that's something that Mr. Malfitano will agree.

MR. MALFITANO: I'm not sure if that fact is actually true, Your Honor, but under the agreements you're not entitled to receive the benefits until you retire. I mean, these people were collecting checks after the petition date and they were working right up until November 30.

MR. PALACIO: I misspoke, Your Honor. Let me correct myself. I think one of the stipulated facts, and again, let correct myself at that point as I misstated my understanding the facts.

The benefit plan was in place. And, what I was getting at and to which I misspoke, is that they were being paid as of the petition date. The important point I'm making is that —

THE COURT: I'm sorry, you say they were being paid?

MR. PALACIO: They were being paid compensation, not pursuant to the benefit plan.

THE COURT: Oh, okay.

MR. PALACIO: The benefit plans were in place. So what 1114 speaks of is that if you were going to modify any benefit plan in place as of the petition date, you need to comply with 1114 requirements. That they're not doing. They're going around that and going to 365 saying, well, if this is an executory contract, they were an employee, we can go to this without having to comply with 1114. I just simply think that 1114 on its face, and as supported by the legislative history, just simply does not support such a position.

I also note that for policy considerations, to the extent Your Honor was inclined today to agree with the debtors and the position they now take, would have enormous implications and would set really bad precedent, for lack of a better word. What it would allow any debtor proposing to go into a Chapter 11 is to manipulate the timing of whether they were going to lay people off, terminate them or whatever they want to do, to say, you know what, we're going to hold onto these people but right before we let them go or have an involuntary retirement, we're going to file 365, reject the retirement contracts. I think that goes counter to 1114 and it

goes counter to the policy that — of 1114 in which — the genesis of which arose out of the *LTV* case, which is when you had enormous amounts of people that lost all of their retirement benefits. So I think policy is there as well as a plain reading of the statute.

Moving on to 365, the debtors say this is an executory contract and they state as much in conclusory fashion. Your Honor, I think if you would even take a cursory review of the contract, the benefit agreement, that we would submit that that's not an executory contract. Under 365, it's — the requirements for assumption and/or rejection is that there be an executory contract. It's axiomatic and the case law so holds that to effect a rejection you also need an executory contract. In the event it's not an executory contract, you can't assume and/or reject the contract. We would submit under the terms of the benefit agreement that if Your Honor was inclined to say 1114 doesn't apply, let's look at 365. We'd say as a threshold matter, 365 doesn't apply, they can't reject, it's not an executory contract.

The obligations, if any, of the former employees do not rise to the level of a material obligation under the contra-mended definition. I would be happy to go through those with you, Your Honor, but I think even a cursory reading of that would say, you're right it's not an executory contract, it couldn't even be so under 365.

MR. MALFITANO: Your Honor, I think I'm going to object at this point. We had a conversation with Mr. Palacio's co-counsel and that's the reason why we wrote the letter to Your Honor, is to streamline the issue. And, I had a

conversation with Mr. Palacio's co-counsel that, you know, to the extent Your Honor ruled in our favor, are we going to have a challenge under 365? And, I was advised that there is no challenge on 365.

My understandings of the agreements, too, is — I would disagree with the characterization that they're not executory either. There are provisions in the contracts that call for non-compete and other provisions in the contract that would not let them have investments in other companies that are competitors of the debtors in order for them to receive that benefit. And, Your Honor, I'll reserve the debtors' rights, even if Your Honor ruled against us, to object to any payments under the benefit agreements for disqualification under the agreements for not being eligible executive. And, those are the provisions that are in the contract that say, you can't compete with the debtor, you can't hold an investment over a certain amount.

So I mean, I don't think it's appropriate for us to go into 365 at this point if I had an agreement beforehand that says the only issue before the Court is whether we're subject to 1114 or 365. I just don't know if there is communication on Mr. Palacio's part with his co-counsel, but Your Honor can do what you want with it and we're prepared to argue that as well.

MR. PALACIO: Well, Your Honor, I'll make one observation. In understanding that the issue phrased for the Court is does 1114 apply or does 365, if Your Honor finds that 365 is applicable, I think the Court necessarily needs to conduct an examination of whether it's an executory contract

or whether it's not. Whether we say it is or not, the Court ultimately has to make a passing on that issue.

So we think whether — even under the agreement that we've reached, it's still an issue that as a threshold matter the Court needs to decide. As for arguing the merits of 365, I think the debtors have squarely put that issue in place and, again — by their own motion. And, again, all that they supply there in conclusory fashion is it's an executory contract, this is our business judgment, we want to reject it.

Again, Your Honor, we would respectfully submit that 1114 does apply. And, to the extent it doesn't, 365 and its language necessarily requires the finding of an executory contract. Here it's not. And, Your Honor, to the extent that you want to discuss the merits of why we believe there are no material obligations or — and essentially that it's not an executory contract, I would be happy and prepared to do so.

THE COURT: I assume that since nobody addressed it in their papers, there is no case law on this — the issue before me or the issue wasn't raised in the papers, it was raised by counsel for the debtors just a few moments ago. There's no case law on the issue of whether one has to be a retired employee in order to have standing to pursue an 1114 claim.

MR. MALFITANO: Your Honor, I have not found a case, but I would note that the cases cited under the objection all deal with employees who were retired and who were going to receive benefits under an agreement after they're retired. I mean the lack of case law, I think, is instructive that you have to be retired in order for 1114 to apply, but Your Honor can take that for what it's worth.

MR. PALACIO: Your Honor, I'll note that I have not uncovered case law on point. I would just refer Your Honor to I114D, which I believe just speaks — directly speaks to retirement benefits.

THE COURT: Well, first of all, let me talk about 365. In my opinion, 365 does not apply for the very simple reason that the language of Section 1114E says, "notwithstanding any other provision of this title," and then it goes on to recite what the debtor can and cannot do with respect to retiree benefits. And, it seems to me that that language, "notwithstanding any other provision of this title," obviously means including, but not limited to Section 365. So in my view, this matter is — in my view, this agreement — it's referred to in the document as an agreement, later on it's referred to as a plan, there is some — I won't say confusion in the language but inconsistent, but in any event, in my view, this is — this could be viewed as an executory contract covered by Section 365. However, 365 — I'm sorry, 1114D1, with it's "notwithstanding" language means that this provision, 1114, overrides 365 with respect to retiree benefits.

Now the principal argument of the debtor, of course, is that these people are not retired. They obviously are no longer employed by the debtor and the agreement — I'm now looking at Exhibit A attached to the objection, the agreement does not define retirement. And, indeed, in several places it talks about giving additional benefits to these people for their many years of valuable services. And, it names these individuals as the initial eligible executors. And, so it seems to me that this agreement, as soon as it became effective, and it recites that the Board of Directors declared it effective

on September 4 of 1997, by definition, they are covered by the benefits.

Furthermore, with respect to at least — there's two elements to the benefit: one is a long-term care program, the other is a retirement health benefit. The long-term care benefit, and this is paragraph 3, says, "effective upon approval of the Board of Directors of this plan," and that approval was September 4 of 1997. It goes on to say, "the Corporation shall pay the annual premium of up to an annual maximum amount of $7,000 for long-term care insurance coverage in the amount specified in Schedule A to the plan," I don't see Schedule A attached to this document, "for eligible executives." Of course, in paragraph 1 it defines the initial eligible executives, and they include all the people — I think they include all the people that are the subject of this issue today.

But the point is that as I read it, the long-term care benefits are benefits that have been — that were being paid by the Corporation during the term of their employment, not triggered by a retirement. So at least as to paragraph 3 benefits, it seems to me that the debtor cannot avoid that obligation.

With respect to paragraph 4, the retirement health benefits, it says, "upon the eligible executive," and that's the defined term including these people, "upon the eligible executive's retirement, the eligible executive and his or her spouse shall thereafter receive for the remainder of their lives, et cetera, the health insurance benefits." Well, let me just finish reading this part. "They shall receive for the remainder

of the lives of the eligible executive and his or her spouse a continuation of the health insurance benefits the Corporation was then furnishing the eligible executive at the Corporation's sole cost."

Absent a definition of retirement in the plan, it certainly seems to me that if the Corporation intended to limit it to people who retired at a specified age, for example, it would have said that in the plan. And, it seems to me that when the Corporation terminates employees with a long history with the corporation and the agreement identifies these people as having had a long history with the Corporation, that when the Corporation terminated them without cause, then I think it's fair that the company has forced their retirement without cause.

If they were terminated for cause, then I think you might have an argument that the benefits would not be triggered. But since it is agreed they were not — I'm sorry. Since it's agreed that they were terminated without cause, I conclude that they should be entitled to paragraph 4 retirement benefits as contemplated by the agreement.

I think it's significant that paragraph 7 specifically provides that the plan is for the benefit of the eligible executive's defined term, therefore, these individuals and their respective spouses, and is binding upon the corporation and its successors and assigns. I note that there is no reservation of rights to amend or repeal this agreement and so it seems to me that the intent was that when these people — the intent was immediately they should have the health care insurance benefit payment — or I should say long-term

care insurance benefit payment, and on retirement they would be entitled to the additional benefits.

And, so because there is no defined term of retirement in here, because the agreement specifically identifies these individuals as people who have given long service to the Corporation and are entitled to these benefits as a matter of contractual right, and because they were not terminated for cause, I conclude that they are eligible for these benefits. I conclude that the matter is not covered by Section 365 and that it is covered by Section 1114.

So until the Corporation and the retiree beneficiaries or their representatives or the Court rules otherwise, they are entitled to the continuation of the benefits.

MR. MALFITANO: Just for one clarification, the section that deals with the long-term care, that Schedule A, Schedule A never existed. Nobody knows where it is, nobody has it. So it's kind of difficult for us to even judge what was suppose to be paid under that provision.

But as a side note, if Your Honor's ruling that an 1114 applies, I think we need to deal with a representative or should we be dealing with the four employees specifically? Because there is no representative appointed for these four individuals.

THE COURT: Well, let's see what the section says regarding the establishment of representatives. Well, it seems to me that the four individuals could make an application to be appointed as a retiree benefit — as the retiree benefits representatives.

MR. PALACIO: Your Honor, would that be with respect to them only or with respect to any other employees out there?

THE COURT: It would be with respect to any other employees who are also eligible employees. Now, what the agreement says is the eligible executives are the five people identified in paragraph 1, and then it says, "any other senior corporate officer elected to the office of senior vice president of the Corporation or higher office." And, three, "any other senior level employee of the Corporation designated by the Board as an eligible executive who, in each instance, has been employed by the Corporation for more than 25 years and is 60 years or older."

So I don't know whether any other employees have been designated already or any other employees hold the level of senior vice president and have worked for more than 25 years and are 60 years old. And, I suspect, therefore, that we're probably talking about maybe nobody else.

MR. MALFITANO: Your Honor, I think I can safely say that there probably is no one else other than, I think James Arcara is not on that list. Charles Johnson has since passed away and Saul Wolf (phonetic) is around, I believe, being paid because he retired prior to us filing bankruptcy.

Just — I mean -

THE COURT: I'm sorry, which individuals made this objection?

MR. MALFITANO: James Arcara.

THE COURT: Arcara, Cronin, —

MR. MALFITANO: Thompson — I believe Thompson is not on that list. Thomas Thompson.

THE COURT: Well, how did he become —

MR. MALFITANO: There's a separate agreement with Mr. Thompson that basically mirrors this agreement.

MR. PALACIO: If it mirrors it, Your Honor, I would submit that he'd be an eligible executive as well, thus entitled to protection under 1114.

THE COURT: Okay.

MR. MALFITANO: I would safely say that there's no other people other than these, because this agreement was really drafted by the four or five people who were on it. It was adopted by the same people, so.

THE COURT: Okay. I guess we've got an inadequate record here. The only thing — I guess the only thing I could say at this point is my ruling applies to Arcara and Cronin, And, I don't know whether it applies to Thompson. I just assumed Thompson was in that list. I don't know whether it applies to Thompson. And, you people haven't given me sufficient information for me to rule on that issue.

MR. MALFITANO: Your Honor, I think we can preserve that and if the agreement does not mirror what the other agreements look like, we can bring it before Your Honor again.

THE COURT: Okay.

MR. PALACIO: Your Honor, just one point. First, I would note — I don't know if Your Honor inadvertently left out this individual, Robert Smith is also an individual covered under the agreement here in addition to Cronin and Arcara. He's one of the moving parties.

THE COURT: I'm sorry. I see Smith. Okay, so three out of the four are named eligible executives in the document.

MR. PALACIO: That's correct. And, logistically, and I will leave it open for discussion here, I mean, I guess we can move for — or have my clients move for the appointment of a representative to represent all, otherwise, eligible individuals under 1114. And, I would ask the debtors, and I think should be, I'll leave it to them, will work with us to identify any individuals so we don't have to go through a prolonged process. The representative does not have to conduct a 2004 to get all this information and so forth.

THE COURT: Okay.

MR. NESTOR: Your Honor, it seems to be that at this point we may be getting a little bit before — putting the cart before the horse because we filed the motion under 365. Your Honor effectively has denied that motion and determined that

1114 applies. And, I think under 1114D, the Court shall appoint a committee if the debtor seeks to modify or not pay the benefits. So at this point Your Honor has denied our motion to reject those contracts. I think that the formation of a committee would really come about in connection with I guess a subsequent motion by the estate to modify or not pay the subject payments.

MR. PALACIO: I would agree with that. I was presuming that they would, but we'll leave that for another day.

THE COURT: Okay. All right. Then you'll submit an order?

MR. PALACIO: Yes, Your Honor.

MR. NESTOR: That's all we have, Your Honor.

THE COURT: Okay. Stand in recess.

(Court adjourned)

APPENDIX E — RELEVANT STATUTE

11 USCS § 1114 (2005)

§ 1114. Payment of insurance benefits to retired employees [Caution: See prospective amendment note below.]

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title [*11 USCS* § § *11*-2 and 1103] for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) [*11 USCS* § § *1114* and 1129(a)(13)] and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

Appendix E

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter [*11 USCS § § 1101* et seq.] (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that —

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or (B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments, after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title [*11 USCS § 1129*] is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall —

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that-

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however,* That at any time after an order is entered providing for

modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title [*11 USCS § 1129*] becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any

benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title [*11 USCS § 502(b)(7)*].

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, cc sistent with the need of the authorized representative of the retirees

to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(l) If the debtor, during the 180-day period ending on the date of the filing of the petition-

(1) modified retiree benefits; and

(2) was insolvent on the date such benefits were modified;

the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

(m) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $ 250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

No. 05-225

IN THE

Supreme Court of the United States

GENERAL DATACOMM INDUSTRIES, INC.,

Petitioner,

v.

JAMES R. ARCARA, FREDERICK R. CRONIN, ROBERT S. SMITH, and THOMAS L. THOMPSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held, under the particular circumstances of this case, that Respondents, who were on the verge of retirement, were entitled to the protections afforded "retiree benefits" pursuant to Section 1114 of the Bankruptcy Code where the Petitioners intentionally terminated Respondents (concededly without cause) in order to deprive them of their rights under Section 1114?

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Respondents respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

STATEMENT OF THE CASE

A. The Benefit Plan

On or about September 4, 1997, the Board of Directors of Petitioner-Debtor General DataComm Industries, Inc. ("GDC") approved a "Benefit Agreement for Long Term Senior Executive Officers and Other Senior Level Employees" of GDC ("Benefit Plan"). The Benefit Plan recites as its purpose the company's desire to benefit "original employees" of GDC:

> WHEREAS, the Corporation desires to provide to certain of its employees (the "Eligible Executives") with certain additional benefits based upon their many years of valuable service to the Corporation.

Benefit Plan, p. 1.

The Benefit Plan consists of two discrete parts: first, a provision for "Long Term Care" requiring GDC to pay the annual premiums of up to $7,000 for long term care insurance coverage for each "Eligible Executive" and his spouse "for the remainder of their respective lives."[1] *Id.*, ¶ 3. The second

1. Eligible Executives included the individuals designated in the Benefit Plan as well as any other senior corporate officer elected to the office of Senior Vice President or higher office, and any other senior level employee of GDC designated by the Board of Directors as an Eligible Executive who has been employed by GDC for more than 25 years, and is 60 years of age or older. *Id.*, 2(a).

benefit under the Benefit Plan was for "Retirement Health Benefits" and provided that "[u]pon an Eligible Executive's retirement, the Eligible Executive and his or her spouse shall thereafter receive for the remainder of their lives . . . a continuation of the health insurance benefits the Corporation was then furnishing the Eligible Executive, at the Corporation's sole cost." *Id.*, ¶ 4.[2]

The Benefit Plan also provided in paragraph 6 that GDC, in its sole judgment, could effectively terminate all benefits under the plan if, among other things, the Eligible Executive directly or indirectly became employed by or purchased the stock of a competitor, brought suit against GDC (except as to claims relating to the Benefit Plan) or disparaged GDC. Apart from certain limited grounds not applicable here, the Benefit Plan was not subject to termination, rescission, or amendment. The Benefit Plan expressly provided that it is binding on GDC's successors and assigns. *Id.*, ¶ 7.

B. Petitioners Termination of Respondents Without Cause

GDC and its affiliates filed their petitions under chapter 11 of the Bankruptcy Code on November 2, 2001.

By Memo dated November 19, 2001, entitled "Termination of all Founders Benefits," from the managing executive of GDC, Respondents Arcara, Cronin, Smith and Thompson were advised, among other things, that Petitioners intended to terminate salaries and the Benefit Plan effective as of November 30, 2001. *See* Stipulated Facts No. 4 dated

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2. Long Term Care Benefits are not at issue. *See* Third Circuit decision, footnotes 2 and 13.

April 23, 2002, marked as an Exhibit at the April 25, 2002 Bankruptcy Court Hearing. On November 30, 2001, as stated in the Memo, Respondents Arcara, Cronin, Smith and Thompson were terminated by the Debtors and all employment benefits ceased. *Id.*, No. 3. Petitioners concede that the termination was without cause. Transcript of April 25, 2002 Hearing, pp. 81, 93.

At the time of their termination in 2001, Thompson was over 71 years of age, Cronin was nearly 70, Smith was 68½ and Arcara was close to 67. Retirees' (i) Motion for a Protective Order to Quash Debtor's Document Request, and (ii) Response to Debtors' Protective Motion For an Order Granting Debtors an Extension of Time in Which to Pay Certain Retiree Benefits, p. 2 n.2, Bankruptcy Court Docket No. 855.

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1103 *et seq.*, the age of "normal retirement" is sixty-five. *See Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 281 and n.3 (3d Cir. 1988).

At the time they were discharged, (a) Respondents Cronin and Smith were being paid $50 a week by GDC to be available for special projects as required, (b) Respondent Thompson was being paid $50 a week for counseling in the office no more than two days a week, and (c) Respondent Arcara was working on certain projects and being paid at a reduced rate. Answering Brief of the Respondents in the District Court, Docket No. 9, pp. 13-14; Respondents' Response in the District Court to Petitioners' Motion to Strike, Docket No. 12, pp. 4-5. Petitioners essentially conceded the foregoing, stating at the Hearing before the Bankruptcy Court that the Respondents were "receiving a

paycheck for being – basically hanging around. They were old founders of the company, senior executives who kind of came in, collected a paycheck. And after the bankruptcy was filed, the Debtors determined that they needed to alleviate some of these costs that were just not worth having." Transcript, p. 81.

C. Petitioners' Motion to Terminate the Benefit Plan

On November 29, 2001, one day before GDC's previously scheduled termination of Respondents' employment benefits, the Petitioners filed their motion ("365 Motion") pursuant to Section 365 of the Bankruptcy Code to reject all benefits under the Benefit Plan for the "present employees" effective as of the Petition Date. 365 Motion, ¶ 10. As stated, one day after the 365 Motion was filed, on November 30, 2001, the Petitioners terminated the Respondents without cause. One of Petitioners' principal contentions below is that since Respondents were "employed" on November 29, 2001, when the 365 Motion was filed, they were not retired at the time of the motion and Section 1114 is inapplicable.

D. Respondents' Objection To the 365 Motion

Respondents' Objection to the 365 Motion averred that since the Benefit Plan qualified for treatment under Section 1114 of the Bankruptcy Code, Petitioners were first required to comply with the procedural requirements imposed by that statute before seeking to terminate or modify the plan. Since Petitioners had not complied with Section 1114, Respondents argued the 365 Motion was premature and improper.

Section 1114(f)(1) requires the trustee or debtor, prior to filing an application seeking modification or termination of retirement benefits, to engage in good faith negotiations with the authorized representative of the retirees in an attempt to reach a mutually satisfactory modification of such benefits. The statute's requirement of negotiations prior to cessation or modification of retiree benefits or an application to modify retiree benefits applies "*[n]otwithstanding any other provision of this title. . . .*" 11 U.S.C. § 1114(e)(1) (emphasis added). Until the procedural requirements of the statute are met, the debtor or trustee "shall timely pay and shall not modify any retiree benefits." Section 1114(e)(1).

E. The Bankruptcy Court Decision

After a Hearing, Chief Bankruptcy Judge Peter J. Walsh denied Petitioners' 365 Motion, holding that the Benefit Plan was covered by Section 1114 and that Petitioners had failed to comply with the requirements of Section 1114(f)(1). The Bankruptcy Court held from the Bench that the Respondents, long time employees of GDC, terminated without cause, were eligible under the Benefit Plan, and entitled to the retirement benefits as contemplated under the Benefit Plan, stating that "when the corporation terminated them without cause, then I think its fair that the company has forced their retirement without cause. . . . I conclude that the matter is not covered by Section 365 and that it is covered by Section 1114." Because Petitioners had not complied with the requirements of Section 1114(f)(1), the Bankruptcy Court denied their 365 Motion.

F. The District Court Decision

The District Court (Jordan, D.J.) affirmed the ruling of the Bankruptcy Court. The decision is reported at 309 B.R. 848.

The District Court found that,

> [R]etirement was the condition precedent to the Appellees' receipt of certain benefits under the Agreements, and the Appellants prevented the Appellees from voluntarily retiring by discharging them without cause. Because the Appellees were not allowed to voluntarily retire, and because, by way of termination, they were forced into retirement, I hold that the Appellees are retirees within the meaning of Section 1114.

309 B.R. at 853.

The District Court dispatched as "irrelevant" Petitioners' contention that Section 1114 was inapplicable because the Respondents were "current, non-retired employees" at the time the 365 Motion was filed. 309 B.R. at 854. The District Court further found that the timing of Petitioners' actions appeared to be manipulative, an action at odds with the purpose of Section 1114 to protect retirement benefits.

The District Court concluded:

> By way of termination, the Appellees were retirees at the time the Bankruptcy Court considered whether Section 1114 or Section 365 applied. Accordingly, the Bankruptcy Court correctly held

> that subjecting the Appellants to the procedural safeguards of Section 1114 was proper.

309 B.R. at 854.

G. The Third Circuit Decision

The Third Circuit unanimously affirmed the District Court. A majority of the court held that given the ages of the Respondents, Section 1114 encompassed the concept of "forced retirement" in this case and that its protections could be invoked by the Respondents. The decision is reported at 407 F.3d 616. The court held that "to allow DataComm to deliberately interfere with Appellees' retirement benefits would operate to frustrate and nullify the objectives of § 1114. . . ." 407 F.3d at 622. The "deliberate and involuntary termination of an employee on the verge of retirement. . . . cannot deprive such an employee of the procedural protections of § 1114." *Id.*, at 624. Addressing the issue raised by the court *sua sponte*, the Circuit Court also ruled that the Benefit Plan was indeed an executory contract within the scope of Section 365 of the Bankruptcy Code.

Judge Pollak concurred in the result but disagreed with the majority's conclusion that Respondents were "retired employees" within the statute. The basis of Judge Pollak's concurrence was that he viewed the Benefit Plan as a non-executory contract outside the scope of section 365.